No. 10395

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ALASKA PACIFIC SALMON COMPANY, a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
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1017 UNITED STATES COURTHOUSE
SEATTLE, WASHINGTON

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OPINION BELOW

The court below did not write an opinion, but filed its Findings of Fact and Conclusions of Law, which are not reported. (R. 12, 34.)

JURISDICTION

Pacific American Fisheries instituted its suit on July 7, 1941, for the recovery of social security taxes

paid for the years 1937, 1938, and 1939 (R. 2-9), pursuant to Section 24 of the Judicial Code, as amended. The court below on October 5, 1942, entered its Findings of Fact and Conclusions of Law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, and entered judgment on October 31, 1942, dismissing plaintiff's complaint and taxing it with costs. (R. 12-20.) On January 9, 1943, plaintiff below filed its notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure. (R. 21.) The appeal was thereupon effectuated pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Alaska Pacific Salmon Company instituted its suit on July 8, 1941, for the recovery of social security taxes paid for the years 1937, 1938, and 1939 (R. 24-31), pursuant to Section 24 of the Judicial Code, as amended. The court below on October 13, 1942, entered its Findings of Fact and Conclusions of Law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, and entered judgment on October 13, 1942, dismissing plaintiff's complaint and taxing it with costs. (R. 34-43.) On January 11, 1943, plaintiff below filed its notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Pro-

cedure. (R. 44.) The appeal was thereupon effectuated pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Did the estimated value of lodging and sustenance, which taxpayer furnished its employees in connection with its fishing and canning operations in Alaska, constitute wages within the meaning of Section 804 of the Social Security Act?

STATUTES AND REGULATIONS INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * *

Excise Tax on Employers

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. * * * (U.S.C. 1940 ed., Title 42, Sec. 1001).

* * *

Rules and Regulations

SEC. 808. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title. (U.S.C. 1940 ed., Title 42, Sec. 1008)

* * *

Definitions

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * * (U.S.C. 1940 ed., Title 42, Sec. 1011)

Treasury Regulations 91, under Title VIII of the Social Security Act:

ART. 14. Wages.—The term "wages" means all remuneration for employment (see article 2). * * *

* * *

The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages within the meaning of the Act if paid by an employer to his employee as compensation for employment.

* * *

The medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, such as goods, lodging, food and clothing.

* * *

Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.

STATEMENT

The above entitled causes of action were consolidated for trial below. (R. 12.) The character of facts in both cases is identical. The appellant, Pacific American Fisheries, Inc., hereinafter referred to as the taxpayer, brought its suit below for the recovery of $4,444.28 social security taxes for the years 1937, 1938, and 1939, while the appellant, Alaska Pacific Salmon Company, brought its suit for the recovery of $1,790.70 social security taxes for the same years. The facts in the appeal of taxpayer Pacific American Fisheries, Inc., are typical of both and will be dealt with in this brief.

In the years 1937, 1938, and 1939, taxpayer was engaged in the business of catching and packing salmon in remote or isolated locations in southeastern Alaska, on Kodiak Island, along the Alaskan peninsula, and on Bristol Bay. The canneries in which the

packing was done were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts, depending upon the run of fish in the districts in which the canneries were located. (R. 13.) During the balance of the year, the canneries were closed down and deserted, except for a watchman left in charge of each. (R. 13-14.) Taxpayer transported most of its employees working in these canneries from Seattle, Washington, or other places in the states, to its canneries in Alaska and returned them at the end of the operating season. During the operating season, it was necessary, and taxpayer agreed, that as part of its operations and in addition to cash compensation, it would furnish most of its employees with lodging and sustenance at its canneries in Alaska, there being no other facilities for such lodging and sustenance. In cases where native Alaskan workers were employed and no lodging and sustenance furnished, additional cash wages were to be paid. (R. 14.) During the years 1937, 1938, and 1939, the estimated value of the lodging and sustenance which taxpayer furnished its employees in connection with its operations in Alaska amounted to $444,428 and the one per cent social security tax which taxpayer paid thereon, and which is involved

in this suit, amounted to $4,444.28. (R. 14-17.) It was a judgment in this amount, plus statutory interest thereon from dates of payment, for which taxpayer unsuccessfully sued in the court below.

SUMMARY OF ARGUMENT

The provisions of Section 804 of the Social Security Act not only include as wages, cash compensation paid to employees, but embrace all other remuneration of whatever kind or nature paid for services actually rendered and which is measurable in dollars and cents. The medium in which compensation is paid is immaterial. The statute, regulations and legislative history compel this conclusion.

ARGUMENT

LODGINGS AND SUSTENANCE ARE PART OF THE REMUNERATION FOR SERVICES PERFORMED AND THEREFORE CONSTITUTE WAGES.

The term "wages" is defined by Section 811(a), *supra*, to mean all remuneration for employment, including the money value of the thing other than cash which is paid to the employee. Article 14 of Regulations 91, *supra*, interpreting Section 811(a), says the statutory term "wages" means all remuneration for employment and that the medium in which the re-

muneration is paid is immaterial. "It may be paid in cash or in something other than cash, such as goods, lodging, food, and clothing." Remuneration paid in such goods is clearly distinguishable from the furnishing of facilities or privileges such as entertainment, cafeterias, restaurants, medical services, and so-called courtesy discounts on purchases furnished by an employer to his employees generally. These latter are not considered as remuneration for services, if such facilities or privileges are furnished by the employer as a means of promoting the health, good will, contentment, or efficiency of his employees. These provisions in respect to food, entertainment, and health facilities have no application whatever to such items as board and lodging. Such construction is borne out by the understanding which Congress had when considering the enactment of the Social Security Act. In H. Rep. No. 615, 74th Cong., 1st Sess., it is stated at page 32 that "Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc."

It is to be noted that the facilities or privileges described in that portion of Article 14 in respect to food, medical services, entertainment and other facilities, are not substantial in character and value. On

the contrary, the estimated value of the lodging and sustenance furnished here is quite substantial. For instance, on the October 30, 1937, return filed with the Collector covering its 1937 operations, taxpayer reported paying $748,725.11 in cash for wages, and $140,954.50 to the same employees as the estimated value of lodging and sustenance furnished them in Alaska during the season. (R. 14-15.) Thus, of the total compensation paid the employees for personal services, lodging and sustenance constituted a large percentage thereof; and such remuneration is certainly not to be compared with the inconsequential value of entertainment, restaurants, medical and other facilities referred to in the regulations as not constituting wages to which the social security taxes apply. It would be stretching the ordinary meaning of simple words to say that the board and lodging furnished here constituted mere facilities or privileges furnished by the employer as a means of promoting the health, good will, contentment and efficiency of its employees.

On page 14 of taxpayer's brief, an office decision of the Commissioner of Internal Revenue (O.D. 814, 4 Cum. Bull. 84 (1921)), is quoted, which held that employees engaged in fishing and canning, who were furnished with lodging and sustenance by the employer, were not required to report the value of such

lodging and sustenance as their *income*, when it was furnished by the employer for his own convenience. It will be noted that this was an office decision promulgated fourteen years prior to the passage of the Social Security Act in 1935. But an office decision does not carry the dignity and weight of a Treasury decision in interpreting the income tax provisions of the Revenue Acts, and does not commit the Department to any interpretation of the law. *Helvering v. N. Y. Trust Co.*, 292 U.S. 455.

It does not follow that the meaning of lodging and sustenance used in connection with the income tax liability of an employee is identical with the social security tax liability of the employer who furnishes such lodging and sustenance as a part of the remuneration for services performed. The income tax of the revenue laws is levied to defray the general expenses of Government and provide for the general welfare, while the Social Security Act was enacted specifically for the benefit of the payees of wages. It was adopted to provide for old age security, unemployment insurance, security for children, and various public health services. H. Rep. No. 615, 74th Cong., 1st Sess., pp. 3-5; S. Rep. No. 628, 74th Cong., 1st Sess., pp. 4-22. The divergent purposes of the income tax acts and the Social Security Act are obvious, and it would seem to follow that what might not constitute

taxable income under the income tax provisions of the Revenue Acts may easily fall within the category of wages under the provisions of the Social Security Act. Thus, "it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Mr. Justice Holmes for the Court in *Towne v. Eisner*, 245 U.S. 418, 425.

S. S. T. 383, 1940-1 Cum. Bull. 201, cited on page 18 of the taxpayer's brief, held that the amounts paid by a baseball club for transportation, room, and board of its players while in training away from home and prior to the beginning of the regular season, did not constitute "wages" within the meaning of the Social Security Act. In the same bulletin in which the above ruling was cited by the taxpayer, there appears on page 211, S. S. T. 386, a ruling with respect to a situation much more closely analogous to the instant case. There, the value of board and lodging furnished to the officers and members of the crews of vessels operated by a steamship company for services performed constituted wages within the meaning of the Social Security Act. Also in S. S. T. 321, 1938-2 Cum. Bull, 323, it was held that the value of

board and lodging furnished to employees by taxpayer at its isolated sanatorium in the mountains constituted wages on which social security taxes were payable under Article 14 of Regulations 91. In this case, like the case at bar, the value of the board and room constituted a substantial portion of the total remuneration received from services performed.

These varied rulings are based on factual distinctions which it is idle to attempt to reconcile. If they be thought inconsistent, some of them must be erroneous. If so, taxpayer is not entitled to a perpetuation of the error. The only question here is whether taxpayer is entitled to be excepted from the plain language of the law. Taxpayer must find a basis in the law for such an exception and it is profitless to explore the case history of other taxpayers who perhaps were not held to the rigor of the law. Moreover, in the cases upon which taxpayer relies, there was a determination that the board and lodging were furnished because necessary for the convenience of the employer. That is the common ground upon which they rest. There is no finding in this case that the maintenance of the employees was actuated by such a reason. Taxpayer was contractually bound to maintain its employees as

a part of their remuneration. (See excerpts from contracts R. 182-194.)

The three Board of Tax Appeals cases cited by taxpayer on page 20 of its brief deal with the income tax laws and are not pertinent to the case at bar. In fact, it is submitted that due to the plain wording of the statute, the unambiguous interpretation thereof by the regulations, and the statement by the Congressional committee, all plainly embracing the value of lodging and sustenance (such as involved here) within the meaning of wages, make the citation of authorities, other than the law, the regulations and the legislative history, superfluous. It is upon the plain terms of the law, the regulations and the Congressional committee reports that the United States of America relies for an affirmance of the judgment below.

CONCLUSION

It is respectfully submitted that the judgments of the court below should be affirmed.

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